

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS HEALTH  
BENEFITS FUND; PIRELLI ARMSTRONG  
RETIREE MEDICAL BENEFITS TRUST;  
TEAMSTERS HEALTH & WELFARE FUND  
OF PHILADELPHIA AND VICINITY;  
PHILADELPHIA FEDERATION OF  
TEACHERS HEALTH AND WELFARE FUND;  
DISTRICT COUNCIL 37, AFSCME - HEALTH  
& SECURITY PLAN; JUNE SWAN;  
MAUREEN COWIE and BERNARD GORTER,

Plaintiffs,

v.

FIRST DATABANK, INC., a Missouri  
corporation, and McKESSON CORPORATION,  
a Delaware corporation,

Defendants.

Civil Action: 1:05-CV-11148-PBS

Judge Patti B. Saris

**DEFENDANT MCKESSON CORPORATION'S OPPOSITION TO PLAINTIFFS'  
AMENDED MOTION FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF  
TWENTY PAGES**

McKesson Corporation ("McKesson") opposes Plaintiffs' motion for leave to file a 25-page Reply Memorandum in Support of Plaintiffs' Motion for Class Certification, and seeks to correct the factual inaccuracies in Plaintiffs' motion:

1. At the February 9, 2006 status conference, Plaintiffs requested that the Court impose strict page limits on class briefing in this case in light of the voluminous submissions in the AWP MDL case, where Plaintiffs but not McKesson is a party. Counsel for Plaintiffs, Thomas Sobol, stated, "I mean, in AWP it was outrageous what the parties did to this Court in

terms of the volume of information we gave you. . . . So there have to be reasonable limits on both parties in terms of how much paper we're allowed to deluge you with and how much time we're allowed to, you know, pull out certain kinds of issues.” (Status Conf. Tr. at 7:20-8:1, Feb. 9, 2006, (attached hereto as Exhibit A).) The Court agreed to Plaintiffs’ request and imposed a 20-page limit on the parties’ motion and opposition, and a 10-page limit on the parties’ reply and surreply on class certification. (*Id.* at 14:17-22.)

2. On December 20, 2006, Plaintiffs filed an Amended Motion for Class Certification with a 22-page brief, and declarations in support thereof. Plaintiffs also filed a 20-page Proffer of Evidence, a 7-page Trial Plan, and continued to rely on a previously filed 9-page Motion for Determination of Controlling State Law. [Docket Nos. 178-83, 73-74.]

3. On January 24, 2007, McKesson filed a 20-page opposition brief and declarations in support thereof. In addition, McKesson responded to Plaintiffs’ Proffer of Evidence, Trial Plan, and Motion for Determination of Controlling State Law. [Docket Nos. 188-95.] Contrary to the assertion in Plaintiffs’ Motion for an oversized brief, McKesson did not file a 78-page class opposition brief, or any document that was not a response to a document Plaintiffs filed with their Amended Motion.

4. On March 19, the day Plaintiffs filed their reply brief, Plaintiffs requested McKesson’s assent to an additional five pages for their reply brief. McKesson agreed on the condition that the same page limit would apply to McKesson’s surreply, subject to Court approval. McKesson did so with the understanding that it was stipulating to a 15-page reply brief and a 15-page surreply.

5. McKesson defers to this Court’s determination regarding the appropriate length for reply and surreply briefs, and respectfully requests that any relief from the page limits previously established by the Court apply to both sides’ submissions.

Respectfully submitted,

McKesson Corporation  
By its attorneys:

/s/ Lori A. Schechter  
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Dated: March 19, 2007

### **CERTIFICATE OF SERVICE**

I, Lori A. Schechter, hereby certify that a true and correct copy of this document was served on the attorneys of record for each party via the Court's electronic filing system this 19<sup>th</sup> day of March 2007.

/s/ Lori A. Schechter  
Lori A. Schechter

# **Exhibit A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS HEALTH )  
BENEFITS FUND, et al, )  
Plaintiffs )

-VS-

FIRST DATABANK, INC., )  
a Missouri Corporation; )  
and McKESSON CORPORATION, )  
a Delaware Corporation, )  
Defendants )

CA No. 05-11148-PBS  
Pages 1 - 23

STATUS CONFERENCE

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
February 9, 2006, 3:30 p.m.

LEE A. MARZILLI  
CERTIFIED REALTIME REPORTER  
United States District Court  
1 Courthouse Way, Room 3205  
Boston, MA 02210  
(617)345-6787

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## 1 A P P E A R A N C E S:

2 THOMAS M. SOBOL, ESQ., Hagens Berman Sobol Shapiro LLP,  
3 One Main Street, Fourth Floor, Cambridge, Massachusetts,  
4 02142, for the Plaintiffs.

5 JOHN A. MACORETTA, ESQ., Spector, Roseman & Kodroff,  
6 1818 Market Street, Suite 2500, Philadelphia, Pennsylvania,  
7 19103, for the Plaintiffs.

8 LORI A. SCHECHTER, ESQ., Morrison & Foerster, LLP,  
9 425 Market Street, San Francisco, California, 94105-2482, for  
10 McKesson.

11 JOAN M. GRIFFIN, ESQ., Burns & Levinson,  
12 One Beacon Street, Boston, Massachusetts, 02108, for  
13 McKesson.

14 MARK C. REDMAN, ESQ., The Hearst Corporation,  
15 1345 Avenue of The Americas, New York, New York, 10105,  
16 in-house counsel for The Hearst Corporation.  
17  
18  
19  
20  
21  
22  
23  
24  
25

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## 1 P R O C E E D I N G S

2 THE CLERK: The case of New England Carpenters  
3 Health Benefits Fund, et al V. First Databank, Incorporated,  
4 et al, Civil Action No. 05-11148, will now be heard before  
5 this Court. Will counsel please identify themselves for the  
6 record.

7 MR. SOBOL: Good afternoon, your Honor. Tom Sobol  
8 for plaintiffs.

9 MR. MACORETTA: Good afternoon, your Honor. John  
10 Macoretta for the plaintiffs.

11 MS. SCHECHTER: Good afternoon, your Honor. Lori  
12 Schechter for McKesson.

13 MS. GRIFFIN: Joan Griffin also for McKesson.

14 MR. REDMAN: Mark Redman, in-house counsel at The  
15 Hearst Corporation, which is the parent company of First  
16 Databank.

17 THE COURT: Thank you. Where are we in this case,  
18 the plaintiffs? Then I'll hear from defendants.

19 MR. SOBOL: Where we are, your Honor, is there are  
20 two defendants. You've ruled on a 12(b)(6) motion as to  
21 McKesson back in December, us, the case ready to go forward  
22 vis-a-vis McKesson. There are settlement discussions that  
23 are under way with the other defendant, First Databank.

24 The issue before your Honor today is what to do  
25 vis-a-vis scheduling. I think that there are three issues

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1 about readiness: First, where are we with the settlement,  
2 number one? Number two, what's the case, just briefly,  
3 generally about so you have an idea about what kind of more  
4 discovery needs to be done apart from AWP? And then, three,  
5 what's my pitch going forward?

6 So as to those, as we reported to you, your Honor,  
7 we are in very active discussions with First Databank. We  
8 don't have an agreement yet. There are some discussions  
9 which are planned in the next week, and we believe that we  
10 should be able to report back to the Court, cross our  
11 fingers --

12 THE COURT: What's the claim against First Databank  
13 again? Is it the basic publishing claim?

14 MR. SOBOL: Yes. First Databank is the publisher.  
15 McKesson is the wholesaler. The counts are the same against  
16 each of the defendants, and the underlying wrongful conduct  
17 that they allege, that we allege, is that the upper bound of  
18 the reimbursement amount, the amount between AWP and WAC, was  
19 increased from a markup factor of .20 to .25 beginning in  
20 January of 2002 for both defendants.

21 We're in active negotiations with First Databank.  
22 I'm crossing our fingers. We hope to be able to tell the  
23 Court whether or not we will or won't have an agreement by  
24 next week.

25 THE COURT: Oh, all right.

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1 MR. SOBOL: By next week. Now, if that slips a  
2 couple of days, it's going to be because people are making  
3 sure that they get all the appropriate authorizations to  
4 either accept or decline, which is also appropriate for the  
5 parties to do here. You know, people have to make a decision  
6 not to settle too on the basis of the terms we talked about.  
7 So that's where we are vis-a-vis the settlement.

8 Second, in terms of the case itself, the plaintiffs  
9 see this as a much more narrow case. We have two  
10 defendants. We've got a narrower time period. There's one  
11 basic act, which is the increase of this markup factor by  
12 McKesson and First Databank during this period of time.

13 In the underlying AWP case, your Honor, we've  
14 already had depositions of McKesson, two other wholesalers,  
15 First Databank, and all of them have produced some amount of  
16 documents. So it's not as if we're even beginning fresh with  
17 discovery either. That's why the plaintiffs have proposed a  
18 schedule which essentially has us filing for class  
19 certification in the summer, for us closing fact discovery  
20 the end of the summer, and for proceedings, you know, to go  
21 essentially along those lines.

22 So the issue before your Honor is twofold: First,  
23 should we delay any more than vis-a-vis McKesson to push the  
24 case forward? And the plaintiffs, we say "no," there's no  
25 reason to do that. First Databank will either know we don't

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1 have a settlement with them in a very, very short period of  
2 time. If it turns out there's no settlement with them, First  
3 Databank will be able to answer the complaint or file a  
4 motion and catch up with where we are with McKesson.

5 THE COURT: Who represents First Databank?

6 MR. SOBOL: Mr. Redman, who is counsel for the  
7 parent company, The Hearst Corporation. He's here.

8 MR. REDMAN: Your Honor, we have not picked outside  
9 counsel yet for this case. We've been focusing all of our  
10 energy right now at this point on the settlement discussions  
11 with Mr. Sobol's firm.

12 THE COURT: If you were a betting man, is there a  
13 greater than equal chance of settlement?

14 MR. REDMAN: I think we do have a greater than  
15 equal chance of settlement, yes.

16 MR. SOBOL: A betting man. Just doesn't play NHL  
17 hockey, though, I hope. So essentially we don't see that as  
18 a reason to wait. I don't think we need to talk anymore  
19 about that. Our schedule is aggressive, we admit, but,  
20 frankly, given the kind of --

21 THE COURT: How can I do a schedule like that  
22 realistically when I'm doing both Neurontin and AWP and I'm  
23 going to trial on 9/11?

24 MR. SOBOL: Well, this is our schedule, your Honor,  
25 not your schedule.

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1 THE COURT: I know. Just at some level I've got to  
2 start ruling.

3 MR. SOBOL: Well, I'll answer that seriously, your  
4 Honor, because I know your schedule very well. And let me  
5 say this: One way to deal --

6 THE COURT: How is this all here? I mean, this was  
7 a related case, is this it?

8 MR. SOBOL: It was seen by some as related because  
9 it has something to do with AWP, and it got filed here, and  
10 it got over here. I even sent letters, you may remember,  
11 apologizing, at least implicitly apologizing to the Court  
12 about how it was being treated as related.

13 In answering, though, that question seriously about  
14 the docket, your Honor, which obviously I have to be mindful  
15 of because if I'm the plaintiff, I'm asking the judicial  
16 resources of this court, I have to be mindful of that, let me  
17 say this: One way to keep down the amount of work also is to  
18 have the parties have firm filing deadlines vis-a-vis class  
19 discovery; you know, the amount of paper that we're allowed  
20 to send you. I mean, in AWP it was outrageous what the  
21 parties did to this Court in terms of the volume of  
22 information we gave you. It was not plausible that we could  
23 have you read that. So there have to be reasonable limits on  
24 both parties in terms of how much paper we're allowed to  
25 deluge you with and how much time we're allowed to, you know,

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1 pull out certain kinds of issues.

2 THE COURT: So you want to move us forward,  
3 whatever my schedule is, you want to move forward?

4 MR. SOBOL: Correct.

5 THE COURT: And you want it more aggressive, and  
6 they want it less aggressive, and we'll just reach some sort  
7 of deadlines rather than just stay --

8 MR. SOBOL: Correct, right. So I'll let  
9 Ms. Schechter then talk to you about it.

10 MS. SCHECHTER: Thank you, your Honor. Let me  
11 address some of the things that Mr. Sobol said. First  
12 Databank and McKesson are alleged to be in a RICO  
13 enterprise. They're the only two participants alleged to be  
14 in the enterprise. And the allegations as to both parties  
15 are essentially the same, that they are part and parcel of a  
16 plan and scheme.

17 Now, there are actually more causes of action  
18 against First Databank than there are against McKesson, and  
19 it seems somewhat incongruous to say we can go forward with  
20 one of these parties when they're alleged to be together in a  
21 scheme and not go forward with the other at the same time.  
22 That is why we said in the meet-and-confer process that we  
23 were having with the plaintiffs over scheduling that it  
24 didn't make sense to set out a schedule until we knew what  
25 the status --

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1 THE COURT: I am going to set out a schedule, and  
2 I'm going to accommodate -- you know, I'm going to set it for  
3 everyone, and it will be broad enough so that if the  
4 settlement discussions fall apart, it will include First  
5 Databank, because they're only talking about another week  
6 when they know, and so I don't want to call you all back in  
7 here.

8 MS. SCHECHTER: Well, and that's fine, and that's  
9 the first we heard that, obviously, because we had not been  
10 told what's going on at all. So with that in mind, I have  
11 come with a proposed schedule that we can work off of because  
12 I think the one that the plaintiffs propose does not take  
13 into account many things that need to happen.

14 I'll also say about a comment Mr. Sobol made that  
15 he's been in the AWP case for several years, and he has the  
16 depositions of all the wholesalers. Well, McKesson is not in  
17 that case. McKesson hasn't seen those depositions, and we  
18 will --

19 THE COURT: Is it a generic?

20 MS. SCHECHTER: McKesson is a wholesaler.

21 THE COURT: It's a wholesaler. I'm sorry, I've had  
22 so many of these. So you've not been brought in on any of  
23 these?

24 MS. SCHECHTER: Correct, correct, McKesson has not  
25 had access to any of that discovery. McKesson has been



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1 informed enough to realize that in the AWP MDL, there was an  
 2 extensive factual record developed and put before the Court  
 3 with respect to class certification to certify the very same  
 4 class that Mr. Sobol seeks to certify here, a third-party  
 5 payor class along with a consumer class for self-administered  
 6 drugs. Your Honor denied that class but did it based upon a  
 7 full record. And obviously McKesson would like the  
 8 opportunity to develop a comparable record, although we think  
 9 you would reach the same conclusion. We obviously need to  
 10 have that record.

11 Now, one thing Mr. Sobol did not mention is that  
 12 the plaintiffs, the day before our status conference  
 13 statement was due, did file another action in California.  
 14 I'm sorry we didn't mention it in our papers. We didn't know  
 15 about it. They didn't send that to us.

16 THE COURT: So I can send this to California?

17 MS. SCHECHTER: Well, it's yet to be seen what's  
 18 going to happen with that. They said in their papers they're  
 19 going to move to transfer that case here.

20 THE COURT: Sure. I mean, unfortunately I do know  
 21 a lot about it. It's just at this point I've got a huge  
 22 amount, and I know everybody understands it, and I'll just  
 23 have to adjust, given what I'm doing in all these pricing  
 24 cases. But what schedule do you want?

25 MS. SCHECHTER: Let me, if I could -- thank you.

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1 THE COURT: I should probably have it. It's just  
 2 I've been busy. Has this been filed?

3 MS. SCHECHTER: No, your Honor.

4 THE COURT: So I won't be too apologetic.

5 MS. SCHECHTER: The schedule that we did file was  
 6 before we knew there was a California case, before we knew  
 7 that the settlement was imminent, and so in light of the  
 8 developments that have happened since we filed, we thought  
 9 we'd better go back to the drawing board.

10 THE COURT: No, no, let's just jump right into  
 11 this. When can you -- I'm going to do both. How long do you  
 12 think you need? I'm not going to start with the class  
 13 discovery and then do substantive discovery. We can run them  
 14 in parallel, in tandem. And so how long do you think you  
 15 need? It's true, you're not as familiar as Mr. Sobol. I  
 16 think he dreams little AWP's jumping over fences. So how long  
 17 do you need?

18 MS. SCHECHTER: Well, the plaintiffs proposed that  
 19 they would file their class motion in June, and our proposal  
 20 is not that much different. We were going to propose the  
 21 first week in July.

22 THE COURT: But how long do you need in discovery?

23 MS. SCHECHTER: Well, we would finish our class  
 24 discovery by that time.

25 THE COURT: No, you're not hearing me. I don't

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1 want to structure it that way.

2 MS. SCHECHTER: Well, you don't have to set a  
 3 cutoff for that, but I think we would need to do fact  
 4 discovery afterward.

5 THE COURT: That all discovery was cut off, what  
 6 would --

7 MS. SCHECHTER: So taking into account the class  
 8 discovery, the class motion, your Honor's ruling on the  
 9 motion, and all the third-party discovery that we think would  
 10 be anticipated, we think we might need until February to  
 11 complete all of the fact discovery.

12 THE COURT: February of?

13 MS. SCHECHTER: Of '07, basically between now and  
 14 next -- almost a year.

15 THE COURT: That's not so unreasonable, given where  
 16 AWP is. AWP has taken me three years, more.

17 MR. SOBOL: Well, first, let's be sure we're  
 18 talking about the same thing. We're talking about fact  
 19 discovery for the whole case.

20 THE COURT: For the whole case.

21 MR. SOBOL: Our view is that it's not necessarily  
 22 that long because the comparison isn't AWP. In the AWP case,  
 23 we took the deposition of McKesson. McKesson knows what it  
 24 said. So apart from finding some more things about what  
 25 people at McKesson knew or didn't know, that's what this case

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1 is about, internally at their own company, and then whatever  
 2 follow-up needs to be done in First Databank. But as  
 3 Ms. Schechter said, because it's two defendants and the  
 4 allegations are what happened vis-a-vis First Databank and  
 5 McKesson, it's really not all that involved. But --

6 MS. SCHECHTER: But as -- I'm sorry.

7 MR. SOBOL: -- in comparison. And because McKesson  
 8 knows what happened at its own deposition, it's not as if it  
 9 needs to know -- you know, the rest of the AWP case isn't  
 10 relevant to it. I mean, it just doesn't have anything to do  
 11 with the AWP case. There was markup factors that occurred.

12 THE COURT: Yes, that's why this will take one year  
 13 rather than five years. So let me do this. Fact discovery  
 14 deadline 1/31/07, is that a real date?

15 THE CLERK: Do you have an '07 calendar, Judge?

16 THE COURT: Here we go.

17 THE CLERK: It is.

18 THE COURT: All right, yes, that is a real date.

19 Now, you're going to run that in tandem with class  
 20 discovery. Do you have some real -- who's serving as the  
 21 proposed class representatives? Is this just a third-party  
 22 payor case?

23 MR. SOBOL: This is just third-party payors, and we  
 24 have the three, you know, funds that have already been named,  
 25 and we have proposed that we could file our class



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1 certification motion on June 1.  
 2 THE COURT: Fine.  
 3 MS. SCHECHTER: Your Honor, can I respond to that?  
 4 The complaint alleges both a consumer class and a third-party  
 5 payor class, so I'm not sure what Mr. Sobol means. He  
 6 doesn't have a class rep.  
 7 THE COURT: I tell you what. Move to dismiss it,  
 8 okay? If he doesn't have a class rep, then you'll have to  
 9 adjust for whether that's appropriate or not.  
 10 MS. SCHECHTER: But he has said that the California  
 11 case where he has now put two class consumers --  
 12 THE COURT: Well, then when I get to it, I'll get  
 13 to it. If he wants to file it by June 1, that's fine. Any  
 14 class discovery you do should be before then. But right now,  
 15 only three proposed class reps, take those right away.  
 16 Now, okay, so any class motion. And if the other case comes,  
 17 when it comes in, I'll worry about it. So your motion for  
 18 class cert for the plaintiffs, June 1, limited to 20 pages;  
 19 opposition, 7/1/06 for the opposition, limited to 20 pages.  
 20 Reply and surreply is limited to 10 pages, 14 days and  
 21 14 days, so we'll say 7/15/06, 7/30/06 for the reply and the  
 22 surreply. So then we should set up a hearing on motions for  
 23 class cert in September.  
 24 MS. SCHECHTER: Does your Honor want to build in  
 25 any time for experts on the class issue --

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1 THE COURT: No.  
 2 MS. SCHECHTER: -- as was done in the MDL?  
 3 THE COURT: Unless I -- that was just different.  
 4 And if I become persuaded that I don't understand it, I'll  
 5 back it off, but right now I'm not seeing that.  
 6 MS. SCHECHTER: Okay. I mean, we will seek to  
 7 present some of the very same evidence that was presented to  
 8 show that the self-administered class for TPPs cannot be  
 9 certified in the same manner that your Honor has already  
 10 ruled.  
 11 THE COURT: That may be true, I mean, because I  
 12 really understand it now. I mean, the expert helped me  
 13 through the industry.  
 14 MS. SCHECHTER: I don't mean the independent  
 15 expert. I was just saying that the parties are going to push  
 16 forth expert reports, and the plaintiffs had contemplated  
 17 that in their order, and we'll need to take their  
 18 depositions. That's all, that's all I was suggesting.  
 19 THE COURT: So play it out a little bit more for  
 20 me. What do you mean? The experts on what? On --  
 21 MS. SCHECHTER: On class certification issues.  
 22 THE COURT: On what issue?  
 23 MS. SCHECHTER: Well, for example, the  
 24 relationships between the PBMs and the TPPs and how it might  
 25 affect the pricing that goes into this, the fact that --

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1 THE COURT: Sure, all the things I saw last time.  
 2 Anything new?  
 3 MS. SCHECHTER: Correct, but McKesson has not  
 4 developed that evidence. We haven't even seen that evidence.  
 5 THE COURT: I think it's either all publicly  
 6 available, and if it's not, move to either make it publicly  
 7 available or to come in under the protective order.  
 8 MS. SCHECHTER: Okay, that would work for us  
 9 because we don't have access to it because of the protective  
 10 order.  
 11 THE COURT: But if you read my opinion, I mean,  
 12 there may be new things because you're a wholesale level, and  
 13 I dealt before with different levels, but we talked quite a  
 14 bit about wholesale. Just I understand it better, and I may  
 15 not decide to hire an independent expert.  
 16 MS. SCHECHTER: I'm just suggesting we would put in  
 17 an expert report.  
 18 THE COURT: Oh, I'm assuming you will. That's fair  
 19 enough. You don't know yet who your expert is?  
 20 MS. SCHECHTER: No, we do not.  
 21 MR. REDMAN: Your Honor, we would probably do the  
 22 same. Again, it is a little different with a publisher  
 23 actually in the case this time as opposed to on the fringes,  
 24 so I just wanted to --  
 25 MS. SCHECHTER: So the issue only becomes, is the

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1 briefing schedule sufficient so that if the parties want to  
 2 take the experts' depositions after the report comes in --  
 3 I'm happy to live with it, but it does give everyone --  
 4 THE COURT: It's hard to say. I mean --  
 5 MS. SCHECHTER: Okay, well, that's fine, and if  
 6 there's an issue, we'll raise it later.  
 7 THE COURT: Now, on the overall fact discovery,  
 8 I've got 1/31/07. For sure, there will be need for experts  
 9 at the liability stage.  
 10 MR. SOBOL: So we would be prepared to file our  
 11 liability experts on the day that fact discovery closes.  
 12 It's also what our proposal has suggested to your Honor, so  
 13 the plaintiffs can go forward on liability --  
 14 THE COURT: I don't want to wait until the end of  
 15 the fact discovery to begin expert designations. I don't  
 16 know that we need to wait that long.  
 17 MR. SOBOL: We're happy to do it well before then  
 18 too, your Honor.  
 19 MS. SCHECHTER: For the reports or for the  
 20 disclosures? For the reports?  
 21 THE COURT: Yes. I don't know that we need to wait  
 22 until the end.  
 23 MS. SCHECHTER: That's fine with us so long as the  
 24 plaintiff's expert doesn't say they cannot complete their  
 25 conclusions until they have all the discovery. We don't want

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1 to have that be a wasted effort.

2 THE COURT: Yes, but here's what I don't want is to  
3 give you a full year for fact discovery and start with  
4 another half a year with experts. That's what I don't want  
5 to do. So I'm going to do this at the tail end here, which  
6 is, I'm going to have -- why don't we say November 15 for  
7 plaintiff's designation, '06, and 12/15/06 for defendant's  
8 expert designation. And then why don't we just say, I don't  
9 know, something like along the lines of 3/9/07 to finish up  
10 any depositions, so the depositions can come in after the  
11 close of all fact discovery. And if you need to tinker at  
12 all with these adjustments based on discovery, you'll let me  
13 know. Motion for summary judgment, April 9, '07; opposition,  
14 5/9/07, once again the 20-page limitations. And then the  
15 hearing would be, in case you're busy, something along the  
16 lines of June of '07 or July of '07.

17 THE CLERK: June 27 at 2:00 p.m., '07.

18 THE COURT: Anyone busy? Now, listen, as far as  
19 I'm concerned, you can by agreement adjust these dates  
20 internally, as long as I end up at a hearing on a motion for  
21 summary judgment on June 27, '07. So just agree to it.

22 Now let me ask you: Why would I certify,  
23 Mr. Sobol, a class on self-administered drugs here in a way  
24 that I wouldn't in the other one? Is there something  
25 different here?

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1 MR. SOBOL: Oh, yes, yes. The reason you didn't  
2 certify a class for the self-administered drug in the AWP  
3 area is essentially twofold: First, you believed that it was  
4 difficult to track the rebates that were going back to  
5 whichever members of the third-party payors; and, second,  
6 that there might be knowledge differences within the  
7 third-party payors regarding whether or not the spread  
8 existed or not. Neither of those two issues apply here.  
9 First, this case doesn't have anything to do about hidden  
10 rebates and how the rebates dropped down the actual selling  
11 price. In this case, we're talking about only the top piece  
12 between WAC and AWP, and so there's no rebate issue here at  
13 all.

14 Second, because we're talking about a disguised  
15 increase with price increases beginning in 2002 going forward  
16 of the difference between WAC and AWP, there's no knowledge  
17 issue at all about how big the spread is generally --

18 THE COURT: None of that confusion on the "but for"  
19 spread and how complicated that is?

20 MR. SOBOL: Right. So the big issues, to be  
21 predictable, that we'll have when we're here at whatever  
22 hearing date we select for class certification will be that  
23 the plaintiffs will say this isn't AWP because those issues  
24 are implied, and McKesson will say the opposite.

25 THE COURT: Okay. And at least by this period of

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1 time, which is what's helpful to me, I should say, even if I  
2 buy all your theories, I should be done with classes one,  
3 two, and three of all track one, and I should be done by this  
4 time period, so this is going to -- I don't know what happens  
5 with class. At some point I need to discuss it with the  
6 whole crew what to do with the second group of defendants.

7 MR. SOBOL: Right. Did we -- Mr. Macoretta tells  
8 me -- did we pick a date for the hearing on class  
9 certification?

10 THE CLERK: No.

11 MS. GRIFFIN: Sometime in September, but I don't  
12 think we got a date.

13 THE COURT: Sometime in September, '06, for class  
14 cert.

15 THE CLERK: September 19 at 2:00 p.m.

16 THE COURT: Let me ask you, on the other case, is  
17 there likely to be an appeal?

18 MR. SOBOL: Yes, I'm just wondering that. We're  
19 very close to it, your Honor, I think.

20 THE COURT: Because that does affect how things  
21 might run. You don't know?

22 MR. SOBOL: Well, there won't be from the  
23 plaintiffs. That, I know. And I think -- I haven't heard  
24 anything at all from the defendants, so I can't predict it.

25 THE COURT: I don't get those notices anymore with

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1 our new fancy-schmancy CM/ECF.

2 All right, so that's it, right? You're going to  
3 let me know, right? If you settle, does that affect things  
4 at all? If First Databank settles, are you engaged in  
5 settlement discussions, or do you want to be?

6 MS. SCHECHTER: We have not been, your Honor.

7 THE COURT: Do you want to be?

8 MS. SCHECHTER: At this point, I don't think we do.

9 THE COURT: All right, well, I sort of don't make  
10 it optional eventually, but not right from the get-go, so  
11 when should I send you to mediation? Is this Eric Green?  
12 Who's doing it for you all?

13 MR. SOBOL: We haven't agreed or talked about  
14 that. I would suggest, your Honor, in the fall.

15 THE COURT: No, but who's doing it with First  
16 Databank?

17 MR. REDMAN: We're doing it in-house, your Honor.

18 THE COURT: Oh, I see. Eric Green is fabulous, as  
19 you know, very professional. I mean, we have excellent  
20 magistrate judges who do it, but this is such a huge and  
21 complicated case.

22 MR. SOBOL: I'd also suggest, your Honor, given his  
23 experience in the AWP case, it might help him with this.

24 THE COURT: Eric Green would be one person, but if  
25 that's not someone who is satisfactory to you, you could go

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1 to the magistrate judge, or anyone else that you think you  
2 might want.

3 MS. SCHECHTER: That's fine, your Honor, I'm happy  
4 to discuss it with my client.

5 THE COURT: Okay, so we'll do that, why don't we  
6 say by October 31, '06. Does that give you all enough time  
7 to -- you've seen the class cert thing play out, you've seen  
8 the discovery play out, okay?

9 MR. SOBOL: Thank you.

10 THE COURT: By 10/31. Who's this case paired with,  
11 do you know? Does this go down to a magistrate judge?

12 MR. SOBOL: It has not yet, no.

13 THE COURT: Do you know, Robert? The two that make  
14 sense are either -- it's probably Judge Bowler, who fully  
15 understands, although she's probably had more than her --

16 THE CLERK: Judge Collings is the magistrate judge  
17 paired in this case.

18 THE COURT: All right, so he's excellent, as are  
19 they all. So you can either go with him, or if you think it  
20 makes more sense to have it transferred to Judge Bowler as  
21 part of the related, she's been doing --

22 MR. SOBOL: A lot.

23 THE COURT: A lot. But let me make this  
24 recommendation: If you decide to stick with Judge Collings,  
25 she would be a particularly good person to try to mediate it,

# CERTIFICATE

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4 UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

5  
6  
7  
8 I, Lee A. Marzilli, Official Federal Court  
9 Reporter, do hereby certify that the foregoing transcript,  
10 Pages 1 through 23 inclusive, was recorded by me  
11 stenographically at the time and place aforesaid in Civil  
12 Action No. 05-11148-PBS, New England Carpenters Health  
13 Benefits Fund Vs. First Databank, Inc., et al, and thereafter  
14 by me reduced to typewriting and is a true and accurate  
15 record of the proceedings.

16 In witness whereof I have hereunto set my hand this  
17 20th day of February, 2006.  
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LEE A. MARZILLI, CRR  
OFFICIAL FEDERAL COURT REPORTER

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1 simply because she has such familiarity with the AWP piece of  
2 it, and she's also a good mediator. So one way to do it  
3 would be to stick with Collings and use her as a mediator.  
4 But if you wanted to switch to her for the magistrate, why  
5 don't you talk about it and ask me within a week, and I'll  
6 see what I can do as a related case, okay?

7 MR. SOBOL: Thank you.

8 THE COURT: Thank you.

9 MR. REDMAN: Your Honor, if I may, just one small  
10 point. As I said, we haven't hired outside counsel yet. If  
11 you would just consider this to be a special appearance and  
12 not a general appearance on behalf of First Databank. So I  
13 don't want to essentially waive the rights --

14 THE COURT: You'll always be special.

15 MR. REDMAN: Thank you very much.

16 (Adjourned, 4:00 p.m.)  
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